In the United States of America
Before the National Labor Relations Board

Sears, Roebuck and Co.,

Respondent

- and -

Local 881, United Food and Commercial Workers,

Charging Party

Case No. 13-CA-191829
Administrative Law Judge
Kimberly Sorg-Graves

Respondent's Brief in Support of Its Exceptions to the ALJ's Recommended Decision and Order

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INTRODUCTION

This case presents the Board with an important opportunity to effectuate the Act by protecting worker choice. The ALJ concluded that Sears, Roebuck and Co. violated the Act by honoring its employees' request to withdraw recognition from UFCW Local 881 simply because those employees signed their petition requesting removal of the Union three weeks before the end of the certification year. She reached this conclusion even though the Company indisputably bargained in good faith with the Union throughout the certification year, the Company did not unlawfully assist the employees with their petition, and the Company did not withdraw recognition from the Union until after the certification year had concluded. In short, the ALJ's recommended decision and order seeks to force the Union upon an unwilling bargaining unit. This recommendation is contrary to Board case law and contrary to the text and the spirit of the Act. It should not be adopted by the Board.

On November 30, 2015, the Board certified the Union as the bargaining representative of a small group of employees working at a Sears retail store in Chicago Ridge, Illinois. On December 2, 2016, the Company withdrew recognition from the Union after a majority of the bargaining unit signed and presented management with a petition asking the Company to do exactly that.

Withdrawing a union's recognition based on evidence showing that a union has lost majority support has been recognized by the Board as a lawful course of action for nearly 70 years. *See Levitz Furniture Co.*, 333 NLRB 717 (2001); *Celanese Corporation*, 95 NLRB 664 (1951). This makes perfect sense, given that the Act requires union representation to be founded upon majority support among employees within the designated bargaining unit:

> Representatives designated or selected for the purposes of collective bargaining **by the majority of the employees in a unit appropriate for such purposes** shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment.

29 U.S.C. § 159(a) (emphasis supplied). Based on this well-established case law and the language of the Act itself, Sears withdrew recognition from the Union after the certification year ended, consistent with the expressed desire of the employees in the bargaining unit.

The ALJ's finding of a violation was not based on any conclusion that Sears engaged in unlawful conduct with respect to the creation or distribution of the decertification petition. (*See* ALJD 11:22-29.) Nor was it based on any finding that Sears engaged in bad faith bargaining. (*See generally* ALJD 11-13.) On the contrary, there was no such allegation by the General Counsel, (GCX 1(c)), and the record evidence shows that the Union agreed with Sears that the parties bargained in good faith. (ALJD 13:9-12.) The ALJ found the withdrawal of recognition to be unlawful solely because

the petition for removal of the Union was signed by employees three weeks before the end of the certification year. (ALJD 4:1-9; Tr. 44:5-47:6; 62:16-19; 91:18-93:17; GCX 2; RX 3.)

More specifically, the ALJ found that *Chelsea Industries, Inc.*, 331 NLRB 1648, 1649 (2000), required her to find an unlawful withdrawal of recognition because the petition was signed before the end of the certification year. (ALJD 13:17-20.) It does not require such a conclusion. If it does, then *Chelsea Industries* should be overruled, and Member Hurtgen's dissenting opinion from that case should be adopted by the Board as law.

The certification year is a concept invented by the Board, rather than created by the Act. It provides that a union may not be ousted involuntarily, despite a majority of employees wanting it to be ousted, during the year following its initial certification. The certification year, however, is a certification year, not a certification year-and-a-day or year-and-a-month or anything else other than a certification **year**. Necessarily, this means that employees must be allowed to take some steps towards ridding themselves of an unwanted union **during** the certification year so they may take action as soon as the certification year expires. In fact, the Board permits employees to request a decertification election as early as the very first day after the certification year expires, based entirely upon a showing of interest gathered during the certification year. *See Chelsea Indus.*, 331 NLRB at 1650 n.9.

Similarly, the Board has permitted an employer to withdraw recognition shortly after expiration of the certification year, based on an employee petition signed on the last day of the certification year. *See LTD Ceramics*, 341 NLRB 86, 88 (2004).

The situation in this case is not meaningfully different from those scenarios. A majority of the bargaining unit signed a petition seeking removal of the Union three weeks before expiration of the certification year, and the Company complied with the employees' request for withdrawal of recognition after the employees presented the petition to management on the final day of the certification year. That action was consistent with Sections 8(a)(5) and 9(a) of the Act, and it should not result in the restoration of an unwanted labor organization to represent the bargaining unit. The Company's withdrawal of recognition based upon the employees' request should be deemed lawful, the ALJ's decision with respect to this allegation should be reversed, and the Complaint should be dismissed in its entirety.

STATEMENT OF THE CASE

The Company's exceptions fundamentally challenge the ALJ's conclusion that it violated the Act by its "reliance on the decertification petition signed within the certification year in withdrawing recognition from the Union after the certification year." (ALJD 13:22-24.) In fact, the opposite conclusion is

supported by the record evidence, the language of the governing statute, and Board case law—and any case law to the contrary should be overruled.

I. Certification of the Union

The Board certified the Union on November 30, 2015, as the exclusive bargaining representative of "[a]ll full-time and regular part-time Backroom Associates employed by [Sears] at its facility currently located at 6501 West 95th Street, Chicago Ridge, IL." (RX 1.)

II. The Overall Course of Negotiations Before Withdrawal of Recognition

The Company and the Union commenced negotiations for a first contract on February 2, 2016, and held 32 bargaining sessions between that initial meeting and November 9, 2016—the final session the parties scheduled for the 2016 calendar year. (ALJD 2:27-28; Tr. 68:2-69:3; 80:20-81:11.) Negotiation sessions took place at the Union's offices in Rosemont, Illinois, with the parties meeting once each month over the course of multiple days.[1] (Tr. 79:15-19; 112:23-25.)

Union Representative Brad Powell initially participated in the negotiations as a Union bargaining team member but eventually became the Union's chief spokesman in negotiations. (Tr. 67:13-68:17.) His counterpart, the Company's chief spokesman for negotiations, was Labor Relations

[1] Even before the withdrawal of recognition, the parties had agreed in advance not to hold any sessions in December 2016, during the busy retail season. (Tr. 80:25-81:16.)

Manager Jim Wingfield, who resides in the vicinity of Seattle, Washington and would fly into Chicago for the bargaining sessions. (Tr. 79:20-25; 80:1-19; GCX 3.)

The General Counsel does not allege that the Company ever violated its duty to bargain in good faith prior to its withdrawal of recognition from the Union on December 2, 2016, and the ALJ made no such findings. (*See generally* ALJD; GCX 1(c).) On the contrary, the parties reached multiple tentative agreements throughout the course of their 32 negotiation sessions. (Tr. 69:1-8; 81:12-16; 84:20-85:24; RX 2, 3.) By the time the certification year expired, the parties were, according to Powell, "getting down to the end," "down to the nitty-gritty—healthcare and wages." (Tr. 69:1-8.) In fact, during a sidebar discussion on November 9, 2016, Powell told Wingfield "that [he] believe[d] both parties had been bargaining in good faith." (Tr. 82:10-15; 84:16-19.)

III. Circulation of the Decertification Petition

On November 8, 2016, bargaining unit employee Barbary Gregory signed a petition for removal of the Union and circulated it among some of her co-workers. (ALJD 3:4-6; 3:33-35; 4:1-2; Tr. 30:15-31:6; 44:5-47:6; 62:16-19; 91:18-93:17; GCX 2; RX 3a.) The petition contained the following text, followed by numerous blank lines for signatures, names, and dates:

PETITION FOR DECERTIFICATION (RD) --
REMOVAL OF REPRESENTATIVE

> The undersigned employees of Sears 1840 (employer name) do not want to be represented by Local 881 (union name).
>
> Should the undersigned employees make up 30% or more (and less than 50%) of the bargaining unit represented by Local 881 (union name), the undersigned employees hereby petition the National Labor Relations Board to hold a decertification election to determine whether a majority of employees no longer wish to be represented by this union.
>
> Should the undersigned employees make up 50% or more of the bargaining unit represented by Local 881 (union name), the undersigned employees hereby request that Sears 1840 (employer name) withdraw recognition from this union immediately, as it does not enjoy the support of a majority of employees in the bargaining unit.

(GCX 2.) Gregory told her co-workers that she had "requested a form to help kind of protect the three associates with autism and that if anyone wanted to sign it they could sign it." (ALJD 4:2-5; Tr. 41:21-42:1; 43:5-13; 55:23-25, 56:8-10; 59:16-20.) In addition to Gregory, six other members of the bargaining unit signed and dated the form right then and there on November 8, 2016. (ALJD 4:1-9; Tr. 44:5-47:6; 62:16-19; 91:18-93:17; GCX 2; RX 3.) One additional bargaining unit employee signed the petition on November 10, after Gregory showed it to him and told him "that if he didn't want to join the union he could sign it or not." (ALJD 4:10-13; Tr. 50:2-51:18; 62:23-25; 91:18-93:17; GCX 2; RX 3.)

IV. The Union Informs the Company of Gregory's Petition

The Company and the Union met for their November bargaining sessions on November 8 and 9, 2016, at the Union's offices. (ALJD 4:40; Tr. 80:20-24.) At the end of those bargaining sessions, Powell asked Wingfield and Store Manager Anthony Harris for a sidebar discussion because he wanted to inform them that he had heard a decertification petition was circulating among employees at the store. (ALJD 4:42-44; Tr. 82:10-23.) During the sidebar, Powell told Wingfield and Harris that "[i]t would just be a shame for this to all blow up after nine, ten months of hard work and both sides bargaining in good faith." (ALJD 4:46-5:2; Tr. 83:2-5.) In response, Wingfield and Harris both expressed surprise that a decertification petition was being circulated, explaining to Powell that they knew nothing about it. (ALJD 5:2-4; Tr. 83:6-10.)

V. The Company Receives the Signed Petition, Verifies the Signatures, and Withdraws Recognition from the Union

After Gregory and the other seven employees signed the petition, Gregory placed it in Harris's desk drawer. (ALJD 4:13-15; Tr. 51:19-23.) She claims she put it in the desk on November 10, 2016, immediately after the last employee signed it, but Harris testified that he found the petition in his desk drawer more than two weeks later, on November 29, 2016. (ALJD 5:6-7; Tr. 51:19-52:3; 109:1-11.)

At any rate, on November 29, 2016, before she left work for the day. Harris asked her: "[A]re you sure this is what you guys want to do?" (ALJD 5:9-11; Tr. 108:1-10; 109:18-25.) Gregory responded in the affirmative. (ALJD 5:9-11; Tr. 108:1-10.) In fact, Gregory testified that no one who signed the petition ever told her that he wished to rescind his signature. (Tr. 61:7-12.)

On December 1, 2016, Harris sent a copy of the signed petition to Wingfield. (Tr. 120:14-25.) Thereafter, Wingfield's boss, Donald Strand, compared the employee signatures on the petition to signatures on other documents contained in the employees' personnel files and thereby confirmed that 8 of the 15 bargaining unit employees had signed the petition. (ALJD 8:30-31; Tr. 89:22-93:17; RX 3.) As a result, Strand authorized Wingfield to withdraw recognition from the Union, which Wingfield accomplished by correspondence sent to Powell on December 2, 2016. (ALJD 9:1-8; Tr. 92:11-14; GCX 3.)

Question Presented

Did the ALJ err in her recommended decision and order by concluding that the Company unlawfully withdrew recognition from the Union? (*See* Exceptions 1-3.)

Argument

The ALJ's recommended decision and order contravenes the plain language of the Act, the spirit of the statute, and longstanding principles

espoused in Board case law. To the extent that any Board case law would require affirming the ALJ, it should be overruled.

Section 9(a) of the Act requires that union representation be founded upon majority support among employees within the designated bargaining unit:

> Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment.

29 U.S.C. § 159(a).

From 1951 until 2001, the Board held that an employer has the right to withdraw recognition from a union based on a good-faith belief that the union lacks majority support among bargaining unit employees. Since 2001, the Board has held that an employer may do so only if it has "objective evidence" demonstrating that the union lacks majority support within the bargaining unit. *See Celanese Corp.,* 95 NLRB 664, 671 (1951); *Levitz Furniture*, 333 NLRB 717, 726 (2001). Sears complied with the *Levitz Furniture* rule in this case by demonstrating that it had "objective evidence"—a petition signed by the majority of the bargaining unit—showing that the Union did not enjoy majority support on December 2, 2016, when the Company withdrew recognition from the Union.

The evidence in this regard is undisputed. Gregory testified that she signed, and watched seven other members of the bargaining unit sign, a

petition explicitly requesting withdrawal of recognition from the Union. She also testified that no one experienced a change of heart between the signing of the petition and the Company's withdrawal of recognition. The Company produced unchallenged evidence demonstrating that the eight signatures on the petition comprised a majority of the bargaining unit on the date of withdrawal. This is precisely the kind of evidence that satisfies the *Levitz Furniture* requirement. Accordingly, the Board should not follow the ALJ's recommended decision and order. The complaint should be dismissed.

Notwithstanding the holding in *Levitz Furniture*, the ALJ found that the Company improperly withdrew recognition in this case because the signatures on the petition to remove the Union were obtained before the certification year expired. The ALJ's finding in this regard, however, runs contrary to the text and the spirit of the Act and is contradicted by Board case law.

The certification year is a one-year period following certification of a new union, during which the union is insulated from a formal challenge to its majority status. *See, e.g.*, *Chelsea Indus.*, 331 NLRB at 1648. It is undisputed, however, that the Company did not withdraw recognition until after the certification year expired. To apply the General Counsel's logic in this case would be to insulate the Union from challenge for a period longer

than the certification year. This is an unjustifiable position in light of the Act's focus on majority rule. *See* 29 U.S.C. § 159(a).

The ALJ's opinion is also contradicted by the Board's holding in *LTD Ceramics*, 341 NLRB 86, 88 (2004), a case in which the Board held that an employer lawfully withdrew recognition after the expiration of the certification year, even though it did so based on a petition signed largely during the certification year. The employer withdrew recognition from the union shortly after the certification year expired, based on a petition signed by 97 of 171 bargaining unit employees. *See id.* at 88. Of the 97 signatures, 49 of them were obtained during the certification year. *See id.* Without the 49 signatures obtained during the certification year, the employees' petition would not have contained enough signatures even to constitute the showing of interest necessary to conduct a Board-supervised decertification election, much less to justify a withdrawal of recognition. Despite the majority of cards being signed during the certification year, the Board found that the employer lawfully withdrew recognition. *LTD Ceramics* requires the same outcome here, given that the signatures in this case were obtained lawfully, just a few weeks before the end of the certification year.

The Board's decision in *LTD Ceramics* is consistent with the fact that the Board generally treats the certification year as a bright-line rule against **formal attempts** to remove a union during the year following certification, not

a rule preventing employees from performing any work at all during the certification year that may later be used to decertify the union after the certification year expires. *See Chelsea Indus.*, 331 NLRB at 1650 n.9 (acknowledging the Board's practice of processing a decertification petition based on a showing of interest gathered during the certification year); *Dresser Indus.*, 338 NLRB 1088, 1088 n.2 (1982) (reinstating decertification petition that must have been based on a showing of interest gathered during the certification year). If unions can be made to withstand a decertification election based on signatures gathered during the certification year, then there is no rational basis for preventing a withdrawal of recognition after the end of the certification year based on the same gathering of signatures.

Along similar lines, even though Section 9(c)(3) of the Act prohibits the Board from holding an election within the 12-month period following a prior election in the same bargaining unit, the Board will process a representation petition filed within the 60 days before the expiration of this statutory period, even based on a showing of interest that predates that 60-day period. *See Vickers, Inc.*, 124 NLRB 1051, 1052 (1959) ("we have decided that with regard to petitions filed hereafter, such petitions will not be entertained if filed more than 60 days prior to the anniversary date of an election, as prescribed in Section 9(c)(3)"); *Pandair Freight, Inc.*, 253 NLRB 973, 978 (1980) (noting that because a petition could have been filed 60 days prior to

the 12-month period following a prior election, the solicitation of employees for a showing of union support would have been done prior to this 60 day period). There is no legitimate basis for accepting employee signatures obtained two months or more before the end of the statutory election-bar period while simultaneously rejecting employee signatures gathered just a few weeks before the end of the Board-created certification year. In both scenarios, the employees' wishes should be honored—in accordance with Section 9(a) of the Act.

The ALJ suggests disregarding the employees' petition in this case solely because the signatures were gathered during the certification year, but that is no different from the situation in *LTD Ceramics*, where the Board held that the employer lawfully withdrew recognition based on signatures obtained near the end of (but still during) the certification year. Given the holding in *LTD Ceramics*, the employees' petition in this case should not be disregarded simply because they gathered the signatures three weeks before the end of the certification year.

There is no rational basis for concluding that the employer in *LTD Ceramics* was permitted to withdraw recognition based on a petition signed one day before expiration of the certification year while denying the Company in this case the ability to honor its employees' wishes expressed in a petition signed just three weeks sooner. Certainly, the basis cannot be what the ALJ

suggests—that there is a bright-line rule prohibiting withdrawal of recognition based upon a petition signed before the end of the certification year. That was not the holding in *LTD Ceramics*, her rationale is contradicted by the holding in *LTD Ceramics*, and such a concept is nowhere to be found in the Act. Indeed, it is contrary to the fundamental objectives of the Act.

To be sure, the ALJ attempted to distinguish *LTD Ceramics* by observing that the employer in *LTD Ceramics* did not "play[ ] even a ministerial role in facilitating the decertification petition that it relied upon in withdrawing recognition from its employees' representative." (ALJD 12:41-13:2.) The ALJ went on to suggest that management's merely ministerial (***i.e.*, completely lawful**) assistance with the petition in this case "does not foster good-faith collective bargaining, one of the goals of implementing the certification year." (ALJD 9:13-11:28; 13:9-12.) This cannot be a legitimate basis for reaching a different conclusion here from the holding in *LTD Ceramics*—the Company did nothing wrong, and the ALJ confirmed that. What sense would it make to penalize **the employees** by thwarting their wishes because **the employer** did something that was perfectly **lawful**? In any event, the ALJ's reading of *LTD Ceramics* in this regard is wrong. The employer in that case (unlike Sears) actually violated the Act during the bargaining process (by unilaterally implementing an attendance policy), yet the Board still held that this did not

"taint the petition" signed by the employees before the end of the certification year and permitted the employer to withdraw recognition once the certification year expired. *Id.* at 89. Here, there is no allegation that the Company ever breached the duty to bargain in good faith during negotiations, and the undisputed evidence is to the contrary. The Company's conduct was lawful, and it bargained with the Union in good faith during the entire certification year.

Simply put, the outcome in *LTD Ceramics* is the correct one, the facts of that case cannot be distinguished in the Union's favor, and that case should be followed here. The Union enjoyed protection from removal for one year following certification (a protection already in tension with the majority rule set forth in Section 9(a) of the Act), and that protection should not be extended any further.

To be sure, the majority opinion in *Chelsea Industries* deviates from the foregoing principles, but (1) that case actually is distinguishable, and (2) it should be overruled in any event. *See Chelsea Industries*, 331 NLRB at 1651-52 (Hurtgen, dissenting).

In *Chelsea Industries*, the employees signed and presented the employer with a petition seeking the removal of their union more than two months (not three weeks) before the certification year expired. 331 NLRB at 1648. As a result, the employer met with the union for more than two months during the

certification year even while knowing for certain that the union was on its way out—and after having already violated Section 8(a)(5) of the Act by refusing to bargain with the union in order to test the union's certification. *See id.* at 1653.

This is the very scenario the certification year is designed to avoid. As the Board majority explained in *Chelsea Industries*, the Supreme Court in *Brooks v. NLRB*, 348 U.S. 96, 100 (1954), approved the Board's creation of the certification-year rule while explaining that the rationale for the rule is two-fold. First, the rule is intended to give a newly-elected union "ample time for carrying out its mandate on behalf of its members [without] be[ing] under exigent pressures to produce hothouse results or be turned out." *Brooks*, 348 U.S. at 100 (internal citation and quotation marks omitted). Second, the rule is designed to eliminate an employer's incentive to violate its duty to bargain in good faith: "It is scarcely conducive to bargaining in good faith for an employer to know that if he dillydallies or subtly undermines, union strength may erode and thereby relieve him of his statutory duties at any time." *Id.* (internal citation and quotation marks omitted).

Here, it is undisputed that the parties bargained in good faith. The parties in this case met 30 times before the petition was even circulated, twice while it was being circulated, and zero times after it was brought to the Company's attention by the Union—and then only because the parties had decided long

beforehand not to meet again prior to the end of the year. The Company and the Union agree that they bargained in good faith for the entire certification year and were down to the "end," or "nitty-gritty," in their contract negotiations when the petition was presented to the Company shortly before the end of the certification year. As a result, there was never even any ability for the circulation of the petition to pressure the Union into accepting "hothouse" results or to encourage the Company to engage in "dillydallying" or undermining of the Union. Nor did those things occur. In fact, Union Representative Powell testified that "the Union believed both parties had been negotiating in good faith." (ALJD 13:9-10.) Moreover, given that the parties were not going to meet again in 2016, no further bargaining would take place during the certification year but after the petition was submitted to management. Because neither of the rationales for the certification-year existed here, this is not a case that would justify essentially extending the Union's protection beyond that certification year, as the ALJ would have it.

That protection should not last even one day beyond the certification year, in the face of uncontroverted evidence that the Union did not enjoy majority support when the Company withdrew recognition. The employees' request to remove the Union was properly honored by the Company and should be respected by the Board.

To the extent the Board believes that *Chelsea Industries* cannot be materially distinguished from the facts of the instant case and concludes that *Chelsea Industries* created a bright-line rule preventing the withdrawal of recognition based on any petition signed during the certification year, that concept cannot be squared with *LTD Ceramics* or with the text and spirit of the Act, and *Chelsea Industries* (along with *Latino Express*, 360 NLRB 911 (2014)) needs to be overruled, unequivocally. Employers, employees, and unions deserve clarity in the law, and clarity in this direction would effectuate the Act and conform to the broader longstanding principles set forth in Board case law much better than adopting the ALJ's recommended decision and order. The Act gives primacy to majority rule within the bargaining unit, and the fundamental purposes of the certification year should not be expanded into a certification year-plus-a-little-bit-more—especially in a case involving no evidence of the kind of situation the certification year is designed to avoid.

Conclusion

The Act is designed to protect, and the Board is designed to effectuate, employee choice with respect to whether or not they wish to be represented by a labor organization. *See* 29 U.S.C. §§ 157, 159(a). Here, a group of employees informed their employer that they no longer wished to be represented by a union, so the Company honored that request in accordance

with longstanding principles of labor relations law. The employees' wishes should not be disregarded simply because they signed their petition a few weeks shy of the certification year. The Board should respect their wishes and protect the intent and spirit of Section 9(a) of the Act by dismissing the Complaint in its entirety.

Respectfully submitted,

SEARS, ROEBUCK AND CO.

By: s/Brian Stolzenbach

Certificate of Service

I hereby certify that I caused a true and correct copy of the foregoing brief to be e-filed with the National Labor Relations Board and served on the following individuals via U.S. Mail and e-mail on this 14th day of September, 2018.

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